(3)

No. 91-397

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

Citizens Against Burlington, Inc., William Reuter
Daniel Kasch, Carol Vaughan, and
Richard VanLandingham, III,

Petitioners,

v.

James B. Busey, IV, Administrator
Federal Aviation Administration
Toledo-Lucas County Port Authority,
and Burlington Air Express, Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The threshold question presented is whether this Court should exercise its discretionary jurisdiction on a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia where that court, after thorough review of a complete administrative record compiled by the Federal Aviation Administration, concluded that the agency fulfilled the requirements of the National Environmental Policy Act and the Airport and Airway Improvement Act, and that the agency acted reasonably and did not commit a clear error of judgment. If this Court determines further review is necessary, the substantive questions which should be considered by the Court are (a) whether the D.C. Circuit acted unreasonably when, on review, it approved of the FAA's definition of reasonable alternatives, which definition excluded alternatives which could not achieve the agency's defined project goals; and (b) whether the D.C. Circuit properly concluded that the discussion of mitigation contained in the Final Environmental Impact Statement ("FEIS") complies with the requirements of AAIA.

PARTIES TO THE PROCEEDINGS

The petitioners in the court of appeals and in this Court are Citizens Against Burlington, Inc., an organization of property owners residing near Toledo Express Airport, and four members of the group, William Reuter, Daniel Kasch, Carol Vaughan, and Richard VanLandingham, III.

The respondents in this Court are James B. Busey, IV, Administrator of the Federal Aviation Administration, who was the respondent in the court of appeals; the Toledo-Lucas County Port Authority, a political subdivision organized and existing pursuant to Chapter 4582 of the Ohio Revised Code which operates Toledo Express Airport and which was an intervenor in the court of appeals; and Burlington Air Express Inc., which was an intervenor in the court of appeals.

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OPINION BELOW

The opinion of the United States Court of Appeals is reported at 938 F.2d 190 (D.C. Cir. 1991) and appears in the Petitioner's Appendix A ("Pet. App. A") at pages 1a-46a.

The Record of Decision ("ROD") and Order issued by the Federal Aviation Administration on July 12, 1990

are not reported. They are, however, reproduced at Pet. App. C, pp. 49a-134a.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 14, 1991. (Pet. App. B at 47a-48a) Petitioners have invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, provides:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) All agencies of the federal government shall –
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short term uses of man's environment and maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Section 502(a) of the Airport and Airway Improvement Act (AAIA), 49 U.S.C. app. § 2201(a)(7) and (11), provides:

> (a) In general, the Congress hereby finds and declares that—
>
> * * *
>
> (7) cargo hub airports play a critical role in the movement of commerce through the airport and airway system and appropriate provisions should be made to facilitate the development and enhancement of such airports;
>
> * * *
>
> (11) airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic, thereby increasing safety and efficiency and reducing delays, should be undertaken to the maximum feasible extent; . . . .

Section 509(b)(5) of the AAIA, 49 U.S.C. app. § 2208(b)(5), provides:

> It is declared to be national policy that airport development projects authorized pursuant to this chapter shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretary of the Interior and the Administrator of the Environmental Protection Agency with regard to any project included in a project grant application involving airport location, a major runway extension, or runway location which may have a significant impact on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have significant adverse effect unless the

Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect.

STATEMENT OF THE CASE

Respondents' Statement of the Case will focus primarily on correcting certain inaccuracies, omissions or misstatements in the Statement of the Case as presented by petitioners.

In April, 1988, the Toledo-Lucas County Port Authority ("Port Authority"), which operates Toledo Express Airport, began to develop a Master Plan Update Study which included the development of a new airport layout plan ("ALP") (Pet. App. C [*the ROD*] at 49a-50a). At the same time, the airport commenced a Noise Compatibility Planning Study pursuant to 14 C.F.R. Part 150 (the "Part 150 Study") the purpose of which was to identify a program of noise reduction measures and land use controls. (Pet. App. C [*ROD*] at 49a-51a). The Part 150 Study was completed and submitted to the FAA in August 1991, two months after the D.C. Circuit decided the case below.

Subsequent to the initiation of the master plan update, the Port Authority was approached by Burlington Air Express ("Burlington") which was seeking to establish a permanent air cargo hub. (Pet. App. C [*ROD*] at 50a) Since 1985, Burlington had been operating from temporary facilities at Baer Field in Fort Wayne, Indiana. (*Id.*) After examining 17 sites in four midwestern states, Burlington chose Toledo Express Airport to establish its permanent hub. (*Id.*) Toledo Express was chosen for a number of reasons, including its proximity to major geographic and industrial markets (mainly Detroit and Chicago), its excellent access to major highways, the quality of its work force and base of skilled labor, the condition of the airport's existing facilities,

maintenance record and operating efficiency, and the Port Authority's commitment to work with Burlington to secure funding and competitive financing for the new permanent hub. (FEIS 2-1 through 2-2)

For its part, the Port Authority served as sponsor of the project by asking the FAA to approve its revised ALP which depicted the facilities necessary to construct the hub. The Port Authority made this request in its role as the lead agency for economic development in the Toledo metropolitan area, and to ensure that the economic benefits which accompany the project will benefit the Toledo area. The Toledo metropolitan area particularly needs those benefits.[1]

On February 2, 1989, the Port Authority submitted to the FAA its ALP revisions for approval. The FAA immediately commenced the necessary studies to determine the acceptability of the ALP revisions from an airspace utilization standpoint, and commenced the preparation of an environmental impact statement. Throughout that process, the FAA painstakingly analyzed all environmental aspects of the project, and responded to voluminous comments from interested individuals, organizations, and governmental agencies.

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1. Since 1980, over 50 major companies have ceased operations in Toledo and/or closed their facilities resulting in a loss of over 7,000 jobs. Toledo is ranked in the bottom third of the nation's 75 largest cities in job creation and retention, and currently ranks last among the major Ohio urban areas in economic development. Up to 1,150 new full and part time jobs will be created for Toledo residents by the project. An annual economic impact of over $42,000,000.00, growing to over $67,000,000.00 will be injected into the depressed Toledo economy. (Pet. App. C [*ROD*] at 74a)

The majority of funding for the project will come directly from user fees and/or lease agreements, and the sale of land not needed for airport purposes after it has been made compatible, or reimbursed at a later date from such sources, after borrowing money for front end costs. In fact, of the 64.5 million dollars designated for costs other than for mitigation, over 46 million dollars will be derived from bond issues to private investors, and only a very small percentage will be derived from local and state participation for economic development.

In response to comments on the draft environmental impact statement by the EPA, the FAA conducted supplemental studies in the area of noise analysis and wetlands delineation, and obtained assurances that mitigation measures would be carried out expeditiously. (FEIS E-39)

The Final Environmental Impact Statement ("FEIS") was issued May 11, 1990, and the FAA issued its Record of Decision ("ROD") on July 12, 1990. Chapter two of the FEIS contains an extensive discussion of alternatives to the proposal. The FEIS gave detailed consideration both to the proposed action of expanding Toledo Express and to the "no action" alternative. (FEIS 2-2 through 2-6, and Chapter 4) In addition, the FAA considered alternative designs and runway configurations at the airport, and alternative distributions of projected air traffic. (FEIS 2-7 through 2-13) The FAA also considered alternative airports, both in and outside of the Toledo area. (FEIS 2-14 through 2-16)

Petitioners claim that the FAA "[r]efus[ed] to [a]nalyze the Fort Wayne [a]lternative" (Pet. 6), but a review of the record shows that is simply not true. To the contrary, the FAA analyzed the Fort Wayne alternative, but found it to be unreasonable. Specifically, the FAA made the following findings:

> Since 1985, Burlington has operated an interim hub at Baer Field in Fort Wayne, Indiana. . . . However, the air cargo facility at Fort Wayne is antiquated and was not designed specifically as an air cargo hub. . . .
>
> Fort Wayne is 163 miles from Detroit, involving 3 hours of ground travel distance to Burlington's automotive markets. The major highway does not connect with the airport. There is a limited available labor pool, and Burlington has experienced difficulty attracting skilled workers and part time employees. At Baer Field, a new building, ramp, and other airport improvements are needed. Fort Wayne was

> unable to put together a competitive funding package and development plan for a permanent hub.
>
> Given these negative factors at Fort Wayne and the advantages of the Toledo Express Airport. . . Fort Wayne is not a reasonable alternative to Toledo for Burlington. Burlington officials have indicated their intention to renew their search for another location should the Toledo Express Airport prove to be unavailable to them. For these reasons, an expanded air cargo facility at Fort Wayne was not evaluated further as an alternative in this document. (emphasis added)

(FEIS 2-14; *see also* Pet. App. C [*ROD*] at 56a-64a). These findings were supported by substantial evidence in the record. (FEIS B-94 through B-96, E-21 through E-33, E-62 through E-64)

Petitioners mischaracterize the record when they assert that Burlington selected Toledo "primarily because Toledo offered it millions of dollars in local, state and federal funds to locate its hub there", without mentioning other important considerations. (Pet. 6) Of course, the package of state, local and private funding designed by Toledo was a factor in Burlington's choice of Toledo, but the FEIS and ROD also made specific findings based on record evidence as to Toledo's proximity to major industrial markets, particularly the automotive industry which accounts for a substantial part of Burlington's business, the inadequacy of the Fort Wayne facilities, Toledo's superior work force including part time college students, the major north-south and east-west highways that cross in Toledo, the foreign trade zone in Toledo and strong community support. (Pet. App. C at 62a) Based on all of this evidence in the record – not just financing – the FAA made the findings cited above.

It is equally incorrect for petitioners to claim that Fort Wayne was Burlington's "backup alternative if its plans for Toledo fell through". (Pet. 8) A dispassionate

review of the record and Burlington's own evaluation of Fort Wayne indicates that Fort Wayne was simply not a practical or reasonable alternative for a number of reasons. Establishing a permanent facility for Burlington at Fort Wayne would require the construction of essentially the same new facilities as those required for Phase I of the construction at Toledo, *i.e.*, a new sortation facility, an aircraft parking ramp, a fuel farm and related infrastructure and other airport improvements. (FEIS 2-15, B-93) It is the responsibility of the airport, not the carrier, to pay for some of these improvements, and the FAA cannot direct any airport to make necessary improvements in its infrastructure to accommodate an airline. There has never been a financial program in place, or even proposed, that would provide a basis for establishing these improvements which are necessary for a permanent hub in Fort Wayne. (FEIS B-93)

Petitioners claim that the Director of the Fort Wayne Airport represented in a letter dated April 25, 1990 that locating a facility there was feasible, and even claim that in an extra-record letter the Chairman of Burlington admitted Fort Wayne was its "backup alternative". (Pet. 7-8)[2] In fact, meetings on financing between Burlington and Fort Wayne officials never proceeded beyond a very general stage. At no time during the course of many discussions did any representative of the Chamber of Commerce, the Airport Authority or its investment banking company ever offer any specific package for the financing of a permanent hub facility at Fort Wayne. (FEIS B-93, E-28)

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2. Those letters are not a part of the FAA record in this case and therefore were not properly before the court below or this Court. Since the issue as to these letters was not raised before the FAA, Section 1006(e) of the Federal Aviation Act (49 U.S.C. § 1486(e)) prohibits consideration of them. Nevertheless, if those letters are relied upon, Burlington's response to them in Burlington's Answer to Petitioners' Request for a Stay and Burlington's Surreply should also be considered.

In short, the evidence before the FAA indicated that while it was possible for Burlington to remain in Fort Wayne temporarily – which might be accomplished with the continuing goodwill and support of both the Air National Guard and Fort Wayne, *albeit* at a great cost – it was not feasible to establish a permanent hub at Fort Wayne for the reasons set forth in the FEIS (FEIS 2-15), and in Mr. Marshall's June 27, 1990 letter. (Respondent's Appendix ("Resp. App.") A; *see also* Resp. App. B) The May 2, 1990 letter from Burlington's Chairman (Pet. App. E), at most, only recognizes that Burlington might need Fort Wayne's help to remain there on a temporary basis a while longer. The vague and indefinite statements contained in the letter can hardly be interpreted as an admission that "Fort Wayne was Burlington's backup alternative". (Pet. 8)

In addition to the discussion of alternatives, the FEIS also contained a full and fair discussion of the noise impacts, including impacts on sleep, that the project would produce. (FEIS Chapter 4) That document and the ROD also presented a detailed plan for mitigating the noise impacts of the proposal by eliminating "almost all existing noncompatible land uses within the 65 L_{dn} noise contour." (Pet. App. C [*ROD*] at 69a) The ROD stated that a total of approximately 100 residences and two nursing homes within the 75 L_{dn} contour will be acquired and residents will be relocated. (Pet. App. C [*ROD*] at 68a) Further, the ROD states that the Port Authority will assemble a relocation team to accomplish the process with as little disruption as possible to the residents. The Port Authority has committed to implement a sound attenuation or easement acquisition program for houses within the 65-75 L_{dn} corridor. (Pet. App. C [*ROD*] at 69a) The Port Authority has committed to take appropriate actions within its powers to implement the mitigation program with or without federal funds. (FEIS E-39)

The mitigation program described in the FEIS and ROD is now well underway. The Part 150 Study, which

is intended to help flesh out the details of the mitigation plan, was completed and submitted to the FAA in August of 1991, before the completion of the hub and the commencement of flight operations, which occurred in September 1991. The Port Authority has been informed by the FAA of an allocation of $7.4 million of Airport Improvement Program discretionary grant funds to be used for property acquisitions. This amount is an increase of approximately $2.6 million in FAA grant funds since the case was argued before the court below. Even before flight operations commenced, the Port Authority, through its relocation consultant, had made many offers to purchase properties, and had received numerous written acceptances. The process of obtaining property appraisals and making offers is on-going at the time this brief is being written.

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant Certiorari Because the D.C. Circuit Properly Reviewed the FAA's Definition of Reasonable Alternatives and Because its Decision is Not in Conflict with the Seventh Circuit

A. The Decision Below Is In Accord with the Court's Limited Authority on Review

The D.C. Circuit's review of the Record of Decision ("ROD") issued by the FAA on the question of "alternatives" was fully consistent with the requirements for review established by this Court. This Court has held that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot " 'interject itself within the area of discretion of the executive as to the choice of the action to be taken' " ". *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980), *citing Kleppe v. Sierra Club*, 427 U.S. 390 and 410 n.21 (1976)). In *Kleppe*, this Court emphasized that neither NEPA nor its legislative history contemplate that a court may substitute its judgment for that of the agency as to the environmental consequences of its action. (*Kleppe, supra*, at 410 n.21)

Review of an agency's discussion of alternatives in an FEIS is made pursuant to a "rule of reason", by which a court determines whether the FEIS contains sufficient discussion of the relevant issues and opposing viewpoints to permit the decision maker to take a "hard look" at the environmental factors, and to make a reasonable decision. (*See id*)

Obviously, a discussion of alternatives cannot be limitless. CEQ regulations obligate agencies to discuss only "reasonable" alternatives. In much the same way, AAIA only requires a finding that no "feasible and prudent" alternative exists to the proposed project. This Court recognized that it is senseless to require more of

an agency when it observed in *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519, 551 (1978) that "the concept of alternatives must be bounded by some notion of feasibility." Thus, the D.C. Circuit correctly recognized in this case that the FAA was required only to discuss feasible, prudent, and reasonable alternatives. (Pet. App. A [*the D.C. Circuit Opinion* ("*D.C. Op.*")] at 9a-13a) The court below concluded that the FAA's FEIS met those requirements — a conclusion fully borne out by an examination of the FEIS and ROD.

The record shows, as the D.C. Circuit noted, that five alternatives to the proposal were identified in the FEIS. Three alternatives, which were identified and discussed, were rejected for more detailed analysis as unreasonable alternatives, including the alternative of locating the hub outside of Toledo. Specifically, the FAA found that "Ft. Wayne is not a reasonable alternative to Toledo for Burlington." (FEIS 2-1, 2-2, 2-15)[3] After examination of the ROD and FEIS, the D.C. Circuit concluded that the FAA's reasoning as set forth in the FEIS "fully supports this decision to evaluate only the preferred and do nothing alternatives." (Pet. App. A [*D.C. Op.*] at 15a)

The D.C. Circuit explained that the FAA reviewed a variety of factors before making this decision. In particular, the FAA examined Congress' expressed views on how the nation is to build civilian airports. Congress has declared that cargo hub airports play a critical role in the movement of commerce throughout the airport and airway system and appropriate provisions should be

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3. The FAA's decision to eliminate the alternative of Burlington remaining in Fort Wayne was supported by substantial evidence in the FEIS, and was reinforced and amplified in the ROD. (*see* FEIS 2-14; Pet App. C [ROD] at 56a-64a; and p.7, *supra*) These findings of fact are supported by substantial evidence in the record (FEIS B-94 through B-96, E-21 through E-33, E-62 through E-64), and thus are conclusive as provided in Section 1006(c) of the Federal Aviation Act. (49 U.S.C. § 1486(c))

made to facilitate the development and enhancement of such airports. (AAIA § 502(a)(7); 49 U.S.C. app. § 2201(a)(7)) Further, airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic "should be undertaken to the maximum feasible extent". (AAIA § 502(a)(11); 49 U.S.C. app. § 2201(a)(11))

The D.C. Circuit further explained "[c]ongress has also said that the free market, not an ersatz Gosplan for aviation, should determine the siting of the nation's airports". (Pet. App. A [*D.C. Op.*] at 15a) Prior to the deregulation of air cargo transportation, the Federal Aviation Act regulated every aspect of air transportation, including the routes a cargo carrier could operate and the cities it could serve. (*See National Small Shipments v. CAB*, 618 F.2d 819 (D.C. Cir. 1980). Under deregulation, Congress decreed that such matters should be decided by private management pursuant to "competitive market forces." (*Id.* at 823; *see also* Section 102(a)(4) and (b)(2) of the Federal Aviation Act, 49 U.S.C. § 1302(a)(4) and (b)(2)). Therefore, as the Court stated in *Suburban O'Hare Commission v. Dole*, 787 F.2d 186, 196 (7th Cir.) *cert. denied*, 479 U.S. 847 (1986), "[t]he decision to make O'Hare, or any other airport a 'hub' belongs to the airlines, and not to the government." These Congressional policies clearly limit the extent to which the federal government can exert authority over hub placement decisions and, thus, were important considerations for the FAA when determining the scope of alternatives which were feasible, prudent and reasonable.

In addition, the FAA took into consideration the Port Authority's reasons for proposing that the cargo hub be built in Toledo. The information in the FEIS established that the Port Authority pushed for development of the hub at Toledo Express in order to reinvigorate the Toledo economy. The project was expected to create hundreds of jobs, pump millions of dollars into the local economy, and attract spin-off business to the area.

Based upon these considerations and other information in the FEIS, the FAA defined the goal for its action as the establishment of a new cargo hub for Burlington Air Express in Toledo. (Pet. App. A [*D.C. Op.*] at 17a) The agency eliminated from detailed discussion those alternatives which would not accomplish this goal, including alternatives of locating the hub airport elsewhere. (*Id.*) The D.C. Circuit found that the FAA's decision making process was valid and that the agency acted reasonably in defining the purpose of its action, in eliminating alternatives that would not achieve that purpose, and discussing the alternative that would achieve that purpose. (Pet. App. C [*D.C. Op.*] at 18a) Given the policy directives of Congress, the limited scope of review authority vested in the Court of Appeals, and the analysis engaged in by the agency, that decision was clearly correct and need not be reviewed here.

B. The D.C. Circuit Decision Is Not in Conflict with Seventh Circuit Precedent

In requesting that this Court review the decision of the D.C. Circuit, petitioners primarily rely upon the Seventh Circuit's decision in *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986). *Van Abbema* involved the review, by the U.S. Army Corps of Engineers, of the environmental impact of the construction and operation of a facility designed to "transload" coal from trucks to barges along the Mississippi River. During the course of this review by the Corps, several parties raised specific objections concerning the false, misleading and inaccurate data provided by the project sponsor concerning the economic viability of alternatives to the proposed project. *Van Abbema*, 807 F.2d at 640. The Corps, without any regard for these objections or any investigation into the accuracy of the disputed data, accepted the factual assertions made by the project sponsor as true and, after reversing the decision of the local district engineer that the project was not in the public interest, granted a

permit for the construction and operation of the transloading facility.

The *Van Abbema* court found fault in the Corps' evaluation of alternatives to the proposal, stating that:

> the Corps, in considering alternative sites, relies upon a record replete with important and factual inconsistencies and ambiguities that the Corps did not attempt to resolve.

(*Id.* at 642) When specifically addressing the issue of whether the Corps adequately evaluated the alternative of utilizing the temporary facility at Quincy, the court further stated:

> [a] review of the record reveals that the Corps never adequately evaluated Quincy, the "no build" alternative. The only comments directed to Quincy were based on false data or unexplained assumptions.

(*Id.* at 640) In further expounding upon the issue of false data, the *Van Abbema* court noted that "no one now contends that these mileage figures are right." (*Id.* at 641) The D.C. Circuit did not find any such errors of fact in this case.

It was the Corps' blind reliance upon factually deficient data which was the focus in the Seventh Circuit's decision to reverse the district court's endorsement of the Corps' analysis of alternatives in *Van Abbema*. The Corps' duty to conduct an independent investigation into the adequacy of an evaluation of alternatives, which petitioners contend extends from *Van Abbema* to all cases in which an agency utilizes information provided by a project sponsor or other outside party (Pet. 20), was imposed in *Van Abbema* because the Corps relied upon false facts in the record after the validity of those facts had been specifically challenged.

Furthermore, the Seventh Circuit, in *Van Abbema*, clearly delineated the court's role in reviewing an agency's evaluation of alternatives when it stated:

> Here the Corps did undertake a serious review of alternatives to the proposal. . . [and] [s]uperficially at least there appears to be record evidence to support the Corps' decision that no preferable alternatives exist. . . . Generally, that would end the matter, and we would agree with the district court that the Corps' decision was not arbitrary or capricious and would uphold the issuance of the permit. However, the attorney general, in particular, contends that the Corps based its conclusions on evidence so inadequate and misleading that we must undertake a closer scrutiny. The plaintiffs and the intervenor have a point to the extent that the Corps' conclusions must find some reasonable support in the record. (emphasis added)

(*Van Abbema* at 639 (*citations omitted*)) Therefore, according to the *Van Abbema* court, in instances where the data underlying an agency's decision is not false, the agency's "serious review of alternatives" should be given deference, and an "arbitrary and capricious" standard, under which the agency's determination must merely "find some reasonable support in the record", should be the rule of law. (*Id.*)

The D.C. Circuit, in holding that the FAA's "judgment [in evaluating alternatives] was not uninformed" (Pet. App. A [*D.C. Op.*] at 20a, *citing Robertson v. Methow Valley*, 490 U.S. 332 (1989)), made no finding that the FAA relied on false, misleading or inaccurate data. Therefore, the decision by the D.C. Circuit not to second-guess the reasoned evaluation of alternatives by the FAA does not conflict with the Seventh Circuit's holding in *Van Abbema*.

Van Abbema and the present case turn primarily on the facts unique to each situation. For this reason, each court's analysis is equally unique. The D.C. Circuit's determination that the language of *Van Abbema* was too broad (Pet. App. A [*D.C. Op.*] at 19a) is correct. The Seventh Circuit's assertion that an agency must evaluate alternatives to achieve the "general goal" of a project

is so broad that it would require examination of impractical, unfeasible and irrelevant alternatives. Such a result would undermine this Court's holding in *Vermont Yankee*, *supra*, and thus was rightfully criticized by the D.C. Circuit. In any event, it is not necessary for this Court to examine the broad language of *Van Abbema* because the undisputed factual errors in that case clearly required the Seventh Circuit to reverse the decision of the district court so that the Corps could reexamine the alternatives based on the correct facts. When the two cases are properly read, based on their unique facts, there is no conflict of legal principle which requires resolution by this Court.

In short, petitioners are asking the Court to grant certiorari in this case so that this Court may resolve a nonexistent conflict among the circuits. The practical implication of petitioners' request is that they are asking this Court to review the opinion of the D.C. Circuit so that the Court can impose a broad, burdensome duty upon federal agencies that no court in this country, including the Seventh Circuit, has said it would be willing to impose.

C. The Decision Below Does Not Authorize Agencies to Abdicate the Responsibility to Define Alternatives

Petitioners also claim that the D.C. Circuit holding authorizes agencies to abdicate the role of defining reasonable alternatives to private project sponsors. (Pet. 19) A careful reading of the Opinion below and the ROD reveal, however, that the D.C. Circuit did no such thing. To the contrary, the FAA, and not the Port Authority, or even Burlington, made the final decision as to the scope of reasonable alternatives that required discussion in the FEIS, and it was that decision making process which the Court below approved.

The D.C. Circuit repeatedly emphasized throughout its Opinion that the responsibility for deciding what alternatives to consider in an FEIS belongs to the

agency. ("An agency bears the responsibility for deciding which alternatives to consider in an FEIS." (Pet. App. A [*D.C. Op.*] at 11a, *citing North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980)). In fact, the D.C. Court stressed ". . . it [an agency] must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decision process." (Pet. App. A [*D.C. Op.*] at 19a (emphasis in the original)) Given this kind of language, it is clear that the D.C. Circuit decision does not create precedent permitting applicants to define the goals and scope of alternatives to be included in an impact statement. Rather, the D.C. Circuit specifically recognized that this responsibility remains vested in the agency. Therefore, petitioners' stated reason for review in this Court – that the decision allows nonfederal applicants to define and control the alternatives analyzed in an impact statement – is without foundation.

In this case, the Port Authority's status as the applicant seeking approval of a specific project, and the Congressional limitations placed on federal government involvement in private decisions regarding the development of hub airports, defined the limits of the reasonable alternatives which the FAA believed should be considered. The FAA in its expertise made this discretionary decision itself after consideration of the nature of the project involved. It did not, as petitioners' contend, abdicate the responsibility for developing of alternatives to either the project sponsor, or the project beneficiary. When the D.C. Circuit refused to second-guess the agency's decision regarding the scope of alternatives requiring full examination, it did not sanction the abandonment of the responsibility for defining alternatives to the project sponsor. Instead, as the Opinion makes clear, it merely refused to criticize an agency decision-making process which included consideration of the nature of the project, the identity of the applicant, and the extent of permitted federal involvement in the proposed project.

D. An Agency May Take Into Account the Goals of a Project Sponsor

In essence, petitioners object to the FAA's decision to take into account the needs and goals of the sponsor. (*But see* Pet. App. A [*D.C. Op.*] at 12a, 16a (holding that FAA may take such considerations into account)). The FAA's decision to take into account the needs of the Port Authority when defining the scope of alternatives and goals for the project is clearly not in violation of any regulatory or statutory mandate. It actually represents the proper understanding of the limited role agencies play in such projects. Petitioners' argument is nothing more than an attempt to have the D.C. Circuit and now this Court, substitute their judgment on the weight given this factor for that of the agency, a standard repeatedly rejected by this Court. (*E.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))

Petitioners assert that the Council on Environmental Quality ("CEQ") has stated, in defining which alternatives are feasible, "[n]either NEPA nor CEQ regulation make a distinction between actions initiated by a federal agency and by applicants." (Pet. 16, *citing CEQ Guidance Regarding NEPA Regulations* [48 Fed. Reg. 34263, 34266 (July 28, 1983)]). In fact, the CEQ actually pointed out, in that same document, that an agency should consider an applicant's purposes and needs when defining the goals of a project. The CEQ said:

> NEPA has never been interpreted to require examination of purely conjectural possibilities whose implementation is deemed remote and speculative. Rather, the agency's duty is to consider "alternatives as they exist and are likely to exist"
>
> * * *
>
> There is, however, no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives. (emphasis added)

The CEQ made these comments in response to a decision by the First Circuit in *Roosevelt Campobello International Park Commission v. U.S. Environmental Protection Agency*, 684 F.2d 1041 (1st Cir. 1982), which recognized that an agency's choice of alternatives may be focused by the primary objectives of the permit applicant. In that case, the court stated:

> EPA's evaluation of alternatives was explicitly based on the premise that its role in reviewing privately sponsored projects "is to determine whether the proposed site is environmentally acceptable", and not, as in the case of a publicly funded project, "to undertake to locate what EPA would consider to be the optimum site for a new facility". . .
>
> We are unable to fault EPA's reasoning. . . No purpose would be served by requiring EPA to study exhaustively all environmental impacts at each alternative site considered once it has reasonably concluded that none of the alternatives will be substantially preferable to the proposed site. Moreover, the guideline adopted by EPA to limit its study of alternatives appears, in this case, to be consistent with the "rule of reason" by which a court measures federal agency compliance with NEPA's procedural requirements.

(*Roosevelt Campobello* at 1046-7) The CEQ refused to criticize the *Roosevelt Campobello* holding in its subsequent discussion of the selection of alternatives in licensing and permitting situations. (48 Fed. Reg. 34263, 34266 (July 28, 1983); *see also Louisiana Wildlife Federation v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985))[4] Thus, while NEPA or CEQ regulations may not make a formal distinction between actions initiated by a

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4. As the *Louisiana Wildlife* and *Roosevelt Campobello* decisions demonstrate, the D.C. Circuit was hardly the first court to recognize that the goals of private project sponsors must be considered, or to use Petitioners' characterization, to "create a distinction between pure and hybrid federal actions." (Pet. 16)

federal agency and by private applicants, as a practical matter, the CEQ has acknowledged that the applicant's purposes and needs and the common sense realities of a given situation inevitably play a role in the definition of reasonable alternatives and project goals. Therefore, it was not improper for the FAA to consider the applicant's purposes here.

Petitioners contend that the D.C. Circuit Opinion creates a "subclass" of EISs for "hybrid federal actions". (Pet. 16) Petitioners claim that under the D.C. Circuit's decision, once the applicant states its preferred alternative, the feasibility of other possible alternatives become irrelevant. (*Id.* at 17) Nowhere in its decision does the D.C. Circuit go this far. At most, the D.C. Circuit merely acknowledged that the definition of goals must be shaped by the nature of the application at issue and the function the agency plays in the decision-making process the very considerations the CEQ has instructed should not be disregarded in developing alternatives.

To prohibit agencies from considering the goals and desires of a private project sponsor when defining the scope of alternatives to be studied would be to ignore reality and force an agency to consider alternatives that are simply not feasible. That kind of futile exercise is unnecessary under NEPA, as this Court and others have repeatedly acknowledged. (*E.g.*, *Vermont Yankee*, *supra*, at 435 U.S. at 551; *Crosby v. Young*, 512 F. Supp. 1363, 1373 (E.D. Mich. 1981))[5]

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5. Expounding on this point, this Court observed: "Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative. . . .") (*Vermont Yankee*, *supra*, at 551) Similarly another Court has stated: "I cannot perceive of a more useless requirement than one that would require an agency to consider alternatives in detail that are not workable. . . ." *Crosby v. Young*, *supra*, at 1373)

Even if the D.C. Circuit opinion could be read to create a subclass of EISs composed of projects which are privately sponsored, as petitioners contend, that result would be of no consequence unless it resulted in a violation of the agency's duty to take a "hard look" at the environmental consequences of its action. (*Kleppe*, *supra*, 427 U.S. at 410 n. 21) In light of the record created by the FAA and reviewed by the Court below, there can be no doubt that a "hard look" occurred here.

II. The FEIS Discussion of Mitigation Complies with the Requirements of AAIA

Section 509 of the Airport and Airway Improvement Act of 1982 (AAIA) provides that the FAA shall not authorize a project which involves a major runway extension or runway location and which has a significant adverse environmental effect unless it first finds that all reasonable steps have been taken to minimize adverse effects. (49 U.S.C. app. § 2208(b)(5)). Petitioners contend that the FEIS' program of mitigation, as approved by the D.C. Circuit, did not meet that statutory requirement of the AAIA. (Pet. 22) Petitioners also ask that this Court substitute its judgment for that used by the FAA and require mitigation to be actually completed and/or fully funded prior to commencement of flight operations. (*Id.*) Such a substitution of judgment would be erroneous.

In reviewing the FEIS and ROD, a reviewing court considers "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment". (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted)). The D.C. Circuit's duty in this case was to determine whether the FAA committed a "clear error of judgment" when it determined that all "reasonable steps" had been taken. "Reasonable steps" is not defined in the AAIA. Therefore, as this Court stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-844 (1984):

> [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[6] (emphasis added)

The D.C. Circuit found that the FAA's FEIS and ROD contained a full and complete discussion of the mitigation efforts that will be undertaken over a three-year period to bring the project within the government's established land use compatibility guidelines and that the FAA had obtained unequivocal assurances from the Port Authority that the efforts will be carried out. Briefly summarized, the FEIS describes the following mitigation commitments:

1. Acquisition of dwellings subjected to noise exceeding 75 L_{dn} and a portion of the dwellings within the 70-75 L_{dn} range and relocation of residents at an estimated cost of $10 million;
2. Acquisition and relocation of two nursing homes impacted by noise exceeding 75 L_{dn} at an estimated cost of $6.2 million;
3. The priority basis on which acquisition will occur;
4. Inclusion of a detailed relocation plan as a companion document to the FEIS;
5. A description of a sound attenuation program and noise and avigation easement purchase program recommended for dwellings in the 65-75 L_{dn} area, including the number of homes affected, the nature of attenuation efforts, and the mobile home and nursing homes excluded;
6. A description of typical sound attenuation improvements;

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6. *See Overton Park, supra*, 401 U.S. at 416 ("The court is not empowered to substitute its judgment for that of the agency.")

7. A discussion of the suitability of sound attenuation to the Toledo site;
8. A description of the alternative of noise and avigation easement acquisitions and the advantages of this alternative; and
9. Cost estimates for sound attenuation.

Reviewing the FEIS, the D.C. Circuit found that it contained a detailed and specific program of mitigation. (Pet. App. A [*D.C. Op.*] at 34a) The Court specifically found:

> [Mitigation] measures include buying out the owners of every private house and nursing home within range of more than L_{dn} 75 decibels, insulating doors and windows in homes subjected to noise between L_{dn} 70 and 75 decibels, and buying easements from the owners of homes within the reach of L_{dn} 65 to 70 decibels.

Likewise, the D.C. Circuit found that the FEIS and its supporting documents clearly reflected the Port Authority's commitment to undertake mitigation. (Pet. App. A [*D.C. Op.*] at 36a) The FEIS contains correspondence from the Port Authority's Director of Ports which assured the FAA that:

> The Toledo-Lucas County Port Authority is very sensitive to the need of establishing appropriate mitigation measures to accompany the development of an air cargo hub at Toledo Express Airport. The Port Authority wants to be as flexible as possible, in order to work with all local, state and federal interests. . . The Port Authority will take appropriate action within its powers to implement, with or without federal funds, the Mitigation measures identified in the final environmental impact statement for the establishment of an air cargo hub at Toledo Express. We are also prepared to provide for all local share funding portions of federal or state grants to be used to accomplish the mitigation.

> The Port Authority intends to comply with all applicable regulations regarding mitigation and will endeavor to accomplish the mitigation as expeditiously as possible.

(FEIS E-39) The FAA, thus, obtained a strong and unequivocal commitment from the Port Authority to complete mitigation. Moreover, as the D.C. Circuit found, the FAA will ensure that mitigation is carried out by imposing special conditions to that effect in its grant agreements. (Pet App. A [*D.C. Op.*] at 35a; FEIS at 4-31) Based on these findings, the D.C. Circuit properly held that the FAA reasonably concluded that a detailed mitigation plan, coupled with grounds to believe that the plan will be implemented, is enough of a 'reasonable step.'" (Pet. App. A [*D.C. Op.*] at 36a) The D.C. Circuit also concluded that the FAA did not commit a "clear error of judgment" and the "FAA has therefore met its obligations under the statute." (Pet. App. A [*D.C. Op.*] at 36a-37a)

The Petition does not allege that the mitigation program is inadequate or ineffective.[7] Petitioners assert that the FAA violated the AAIA because it did not require all mitigation, including the Part 150 Study, to be completed prior to commencement of flight operations. (Pet. 22) Petitioners also contend that the FAA violated the AAIA because it did not require the Port Authority to have assembled all funds necessary to implement the recommended mitigation measures and/or have a fixed timetable for completion of mitigation prior to commencement of flight operations. (*Id.*)

As stated by the D.C. Circuit, petitioners "read [sic] too much into . . . section 509(b)(5)." (Pet. App. A [*D.C.*

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7. If the cryptic and largely unintelligible footnote on p. 11 of the Petition is intended to assert that the FAA violated the DOT Act because it approved the cargo hub without adequately evaluating measures to mitigate the project's adverse effects, it should be disregarded. Petitioners did not address this point in their argument, so it must be considered waived.

Op.] at 36a) Significantly, petitioners do not cite a single case from any court requiring that mitigation be completed before service begins. The Ninth Circuit imposed such a requirement in one case, but that decision was reversed by this Court in *Robertson v. Methow Valley*, 490 U.S. 332 (1989). Petitioners seek to distinguish *Methow Valley* by arguing that this Court left open the issue of mitigation where there is a "substantive" statute requiring mitigation measures. The issue is not whether AAIA is a substantive statute since the District Circuit held the FEIS complied completely with the terms of AAIA.[8] The D. C. Circuit correctly noted that "Section 509(b)(5) does not order agencies to take all steps to lessen environmental trauma, just all reasonable ones. (Pet. App. A [*D.C. Op.*] at 36a)

The FAA has the statutory authority to determine that all reasonable steps have been taken to minimize adverse environmental effects before it authorizes a project under § 509(b)(5) of the AAIA. The mitigation plan contained in the FEIS is a detailed, comprehensive, three-year plan. In interpreting § 509(b)(5), the D.C. Circuit concluded that FAA's determination that a detailed mitigation plan combined with grounds to believe that the mitigation plan will be implemented constituted enough of a reasonable step for purposes of AAIA compliance, and that the FAA did not commit a clear error of judgment. (Pet. App. A [*D.C. Op.*] at 36a) Insofar as the D.C. Circuit properly determined that the FAA's mitigation determination was reasonable, it is unnecessary for this Court to review and reiterate the D.C. Circuit's holding.

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8. Petitioners give no citation for their claim at Pet. 20-21 that "the decision below holds, in effect, that "substantive" mitigation requirements are no different from "procedural" ones, and therefore robs substantive requirements of their action forcing character." The D. C. Circuit made no such holding but merely held that the FEIS complied with AAIA in full.

Petitioners' assertion that mitigation must be completed or fully funded before Burlington begins operations from Toledo is unreasonable because petitioners attempt to impose an environmental standard which exceeds the requirements of the AAIA. The statute requires completion of all reasonable steps prior to authorization of a project. By requiring completion of a detailed mitigation plan combined with assurances that the plan will be competed within a specified time frame, the FAA assured that all reasonable steps had been taken prior to authorizing the project to proceed. Requiring completion of mitigation prior to authorization of the project is unreasonable because it would have unnecessarily delayed the project for three years, despite Toledo and Burlington's compelling need for the hub which could not wait that length of time.

This Court in *Robertson v. Methow Valley*, stated: "[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." (490 U.S. at 353 n.16) This language implies that where a statute does contain a substantive requirement, such as the AAIA, that requirement can be met where an agency has obtained assurances from third parties that particular measures will be implemented, as is true in this case.[9]

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9. In *Methow Valley*, this Court also cited statutes imposing substantive environmental obligations such as the Endangered Species Act (ESA). (490 U.S. at 351 n.14) An example of a substantive statute referred to by this Court was before the Ninth Circuit in *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984). The Fisheries Service in that case issued a final Biological Opinion, making several reasonable suggestions by which the Secretary could ensure that a proposed sale of oil leases did not jeopardize the continued existence of any endangered species. The court of appeals noted that the generality of the recommendations implied that the Secretary could choose the appropriate method after the lease sale. Nonetheless, the court held that the Secretary of the Interior did not abuse his discretion under the ESA by

The FEIS provides a detailed mitigation plan that will be implemented over a three-year period. Significantly, the Port Authority has already been informed by the FAA of an allocation of $7.4 million of Airport Improvement program discretionary grant funds that are available for use in property acquisitions and relocation assistance.[10] The mitigation is well underway. Actual implementation of mitigation demonstrates that the FAA reasonably relied on the Port Authority's commitment to implement the detailed mitigation plan contained in the FEIS and that the Port Authority's commitment satisfies the AAIA.

Petitioners also contend that the FAA violated the AAIA because it did not require completion of the Part 150 Noise Compatibility Study prior to commencement of flight operations. (Pet. 22) While the FAA did not require the Part 150 Study to be completed prior to commencement of flight operations, the Study was, in fact, completed and submitted to the FAA in August 1991 – a full month prior to commencement of Burlington's flight operations. The fact that the study is now

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Fn. 9 (*Cont.*)
deferring imposition of specific protections for endangered whales until after the proposed sale of oil leases.

In reaching its conclusion, the court noted that the Fisheries Service had reached an agreement with the Secretary providing for the continued monitoring activity after the lease sale and that the Secretary had placed special disclaimers in the Final Notice of Sale specifying "his continuing control of any post-sale drilling." (733 F.2d at 611) While appellants characterized these factors as "only a plan for later action", the court concluded that by choosing this plan, the Secretary recognized his obligation under the ESA to implement the plan. (*Id.*) Significantly, the court found that the monitoring agreement with the Fisheries Service would "help the Secretary take these steps and diligently pursue ESA compliance after the lease sale." (*Id.*)

10. This amount is an increase of approximately $2.6 million in FAA grant funds since this case was argued before the court below.

complete also shows that the FAA reasonably relied on the Port Authority's commitment to implement mitigation plans.

The D.C. Circuit properly concluded that "the Port Authority's Part 150 study will be detailed, as the law requires, and we do not think that the agency committed a 'clear error of judgment' in deciding to use the study to perfect the timing of an otherwise concrete proposal." (Pet. App. A [*D.C. Op.*] at 36a, *citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))

A proper understanding of the function that this Study will serve in relation to the mitigation plan demonstrates that it was reasonable for the FAA to issue its ROD prior to completion of the Part 150 Study. The Part 150 Study is not the commitment to engage in mitigation or even the description of the nature of that mitigation. Those matters are included in the FEIS. Rather, the Part 150 Study is the document which fine-tunes the defined steps described in the FEIS that will actually be undertaken. As the court below found, the Part 150 Study "will help flesh out the details of the mitigation plans." (Pet. App. A [*D.C. Op.*] at 35a)

The D.C. Circuit properly concluded that "section 509(b)(5) does not order agencies to take all steps to lessen environmental trauma, just all reasonable ones." (Pet. App. A [*D.C. Op.*] at 36a (emphasis in original)). The court below properly held that the FAA has taken all reasonable steps and has met its obligations under the statute. Accordingly, review of this case by writ of certiorari is unwarranted.

CONCLUSION

For these reasons, the Petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully Submitted:

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November, 1991

APPENDIX

APPENDIX A

BURLINGTON
AIR EXPRESS

David L. Marshall
CHAIRMAN
CHIEF EXECUTIVE OFFICER

June 27, 1990

Mr. Peter A. Serini
Manager
Detroit Airports District Office
FEDERAL AVIATION ADMINISTRATION
Willow Run Airport, East
8820 Beck Road
Belleville, MI 40111

Dear Mr. Serini:

During the course of the Environmental Impact Statement (EIS) process in relation to the creation of a permanent air cargo hub at the Toledo Express Airport, I have had the opportunity to review comments submitted to the record by numerous parties. The purpose of this letter is to respond to comments submitted by Mr. Thomas E. Frank on May 15, 1990, which I have become aware of only this week, concerning discussions Burlington has held with the Fort Wayne-Allen County Airport Authority, and remarks attributed to me which appeared in the Fort Wayne Journal-Gazette on May 12, 1990. With this letter I intend to set the record straight that Burlington Air Express remains committed to the establishment and utilization of an air cargo hub at Toledo Express Airport.

Mr. Frank alleges that Burlington has a "standby second choice to Toledo", with those views apparently based on a newspaper article which suggested that Burlington would consider staying in Fort Wayne if it were unable to move to Toledo. Mr. Frank also stated that Burlington and Fort Wayne are "already actively dismissing Fort

Wayne as an alternative to Toledo." Apparently these statements are also based on the same newspaper article.

I wish to affirm for the record that Burlington Air Express does not have any existing viable alternative to the proposed new hub project in Toledo. Very simply, the Fort Wayne-Allen County Airport Authority has not been able to develop sources of financial support for the extensive airport improvements required in connection with our hub project. Specifically, Fort Wayne lacks the necessary aircraft parking ramp, fuel farm, related infrastructure and other airport improvements. Despite the continuing good will of the Fort Wayne airport management, funding for these improvements has not been achievable in Fort Wayne. On the other hand, adequate funding and planning for this major project has been created in Toledo with the assistance of the Toledo-Lucas County Port Authority. There are other very important reasons for our need to relocate to Toledo, including location closer to our primary market, the existence of a preferred highway network and the availability of an expanded labor pool. These factors, together with the lack of financial support for the project in Fort Wayne, lead to the necessary decision to relocate to Toledo.

Burlington's recent discussions with Fort Wayne have related to a temporary extension of our existing hub agreement pending completion of the delayed Toledo project. Throughout those discussions with Fort Wayne, Burlington maintained very openly its continued commitment to its permanent hub facility Toledo.

As Chief Executive Officer of Burlington Air Express I am pleased to re-affirm for the record that our company is absolutely counting on the new Toledo hub as the most critical element in our future operating plan. For an air cargo company, its hub is its heart in every sense. We are facing "heart transplant surgery" and I cannot over-stress how fundamental it is for the future of our company that our new hub in Toledo be developed, completed and operated as set forth in the Environmental Impact Statement.

Sincerely,

/s/

David L. Marshall

DLM/tp

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CITIZENS AGAINST
BURLINGTON, INC.
et al.
Petitioners,

v.

JAMES BUSEY,
Administrator,
Federal Aviation
Administration
Respondent.

No. 90-1373

AFFIDAVIT OF DAVID L. MARSHALL

I, David L. Marshall, Being duly sworn, depose and state:

1. I am the Chairman of Burlington Air Express, Inc. ("Burlington").

2. When I received Mr. Koslosky's letter dated April 25, 1990 (Petitioners' Exhibit J) I responded with a letter dated May 2, 1990 (Petitioners' Exhibit M). In my letter I stated as follows:

> "Burlington remains committed to the Toledo project in exactly the same manner as you and I discussed last February, though the necessary 'kick-off' time for this major event has now drawn much closer. There are many risks ahead, and there continue to be major uncertainties. In this environment, I remain deeply grateful for the continuing support of the Fort Wayne/Allen County Airport Authority and for your own leadership. I accept the spirit and purpose of your letter, and I want to assure you that

I will look to Fort Wayne for support and solutions as and if our Toledo commitment is altered by any of the risks or uncertainties that lie ahead." (Emphasis added.)

3. Those statements were true when written and are still true today. Burlington was and is "deeply grateful for the continuing support of the Fort Wayne/Allen County Airport Authority" in extending the Burlington lease and thus allowing Burlington to remain at Fort Wayne for 15 months pending the development of the Toledo project. By the same token Burlington may need a further extension of its Fort Wayne lease in the event of further delays and thus would have to "look to Fort Wayne for support and solutions as and if our Toledo commitment is altered by any of the risks or uncertainties that lie ahead."

4. Mr. Koslosky's letter of April 25, 1990 (Petitioners' Exhibit J, p.3) also indicated that financing might be available for a permanent Burlington hub at Fort Wayne. Burlington's prior dealings with Fort Wayne gave Burlington no reason to believe that the hopeful statements in the April 25, 1990 letter reflected a dramatic change in the existing situation in Fort Wayne. Nevertheless, I took this letter very seriously. I believed it highly desirable to maintain the good relationships which had facilitated the previous lease extension covering Burlington's temporary hub. As a matter of courtesy and prudent due diligence, therefore, I instructed Glen Beecher to meet with the Fort Wayne Authorities which he did with the results described in Glen Beecher's Affidavit (Burlington's Exhibit C). As stated in Beecher's Affidavit those meetings and conversations took place after my letter of May 2, 1990. They confirmed the prior situation, i.e., that there was no viable financial plan in prospect for establishing a permanent hub and related airport improvements at Fort Wayne.

5. My letter to the FAA dated June 27, 1990, which is attached to the ROD, was written after those meetings and correctly confirmed that no viable alternative had been developed for a permanent hub at Fort Wayne. The statements in my letter dated May 2, 1990, to Mr. Koslosky and my letter to the FAA dated June 27, 1990, are both true and are mutually consistent.

6. There is also no basis in fact for the Petitioners' claim (p.9) that "Burlington itself says it can even accommodate a project cancellation by remaining in Fort Wayne Pet. Ex. M." As indicated at length in Burlington's Answer, pp.1-8, Petitioners confuse the possibility of remaining at Fort Wayne temporarily – which might be accomplished with the continuing goodwill and support of the Fort Wayne Airport Authority, albeit at a great cost – with establishing a permanent hub at Fort Wayne which is not feasible for the reasons set forth in my letter to the FAA dated June 27, 1990.

7. The top of Petitioners' Exhibit M indicates that it was faxed to them by "FWAC Airport Authority," i.e., the Fort Wayne Allen County Airport Authority. It is therefore significant that Petitioners' Reply contains nothing which refutes or even takes issue with Glen Beecher's Affidavit stating that Fort Wayne never offered "any specific package for the financing of a permanent hub facility at Fort Wayne" and that Burlington would be faced with significant environmental issues at Fort Wayne (Exhibit C to Burlington's Answer).

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 31, 1990

/s/
David L. Marshall